

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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No. 89-545

LAWRENCE E. BOWLING,

Petitioner,

v.

DAVID G. BRONNER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Opinions Below

The opinions of the United States District Court for the Middle District of Alabama (Thompson, D.J.) were not published but are printed at pages 10-26 of the Appendix to the Petition.

The opinion of the United States Court of Appeals for the Eleventh Circuit was not published but is printed at pages 1-9 of the Appendix to the Petition.

Jurisdiction

Petitioner seeks to invoke jurisdiction of this Court pursuant to 28 U.S.C. §1254 which provides that the Court may review decisions of the Courts of Appeal.

The Questions Presented For Review

Respondents do not wish to restate the Questions Presented For Review in the Petition because Respondents are not seeking review of any questions. Respondents, however, note here that the factual premises of the Questions Presented For Review in the Petition are not consistent with the facts of this case as shown by the record.

Statutes Involved

The statutes involved are §16-25-1, et seq., **Code of Alabama 1975**, and, in particular, §16-25-14, **Code of Alabama 1975**, which is set out at page vii of the Petition, and 42 U.S.C. §1983. Petitioner also asserts claims under the First and Fourteenth Amendments.

Statement of the Case

Petitioner invoked federal jurisdiction in the District Court pursuant to 42 U.S.C. §§1983, 1985, 1986 and 28 U.S.C. §§1343, 2201 and 2202. Respondents disputed and continue to dispute such jurisdictional basis. The Petitioner is a white male who is not alleging racial discrimination and Respondents are state officials who are not "persons" within the purview of 42 U.S.C. §1983 as this Court recently held in **Will v. Michigan Department of State Police**, 57 L.W. 4677 (June 15, 1989).

The Petitioner is a retired university professor who by this action is seeking both the retroactive payment of state retirement benefits for a period of four years before he retired and punitive damages against the Respondents.

The Respondents are state administrative officers, employees and board members of the Teachers' Retirement System of Alabama, an instrumentality of the state of Alabama and a governmental pension plan created by, and existing pursuant to, §16-25-1, et seq., **Code of Alabama 1975**, for the provision of certain retirement and survivor benefits for public school teachers in the state of Alabama.

Petitioner was employed by the University of Alabama from September 1, 1964 until May 16, 1976 and in such capacity participated in the Teachers' Retirement System from the date of his initial employment.

Petitioner first inquired about retirement qualifications in August, 1972 and was supplied with a handbook, or pamphlet, correctly and fully explaining the age and service qualifications for retirement, the benefits paid and other aspects of the retirement law as they then existed in 1972.

In December, 1979, Petitioner inquired about retiring and in January, 1980, filed formal application for retirement benefits. Upon applying for retirement Petitioner demanded that he be paid retroactive benefits for a period of four years prior to the date of his retirement. He argued that the applicable state statute provided for the payment of benefits from the time that one becomes eligible to retire and not from the time that one does, in fact, retire. Secondly, he informed Teachers' Retirement System officials for the first time that when he first became eligible to retire he had been engaged in litigation in federal court against the University of Alabama over his dismissal and could not apply for retirement because to do so would moot his federal lawsuits. He argued that the denial now of retroactive benefits would violate his First Amendment right to petition the courts.

Petitioner, Dr. Lawrence Bowling, had been dismissed from his position as a Professor at the University of Alabama effective August 13, 1972. At the time of his dismissal he was not eligible for retirement under the state teachers' retirement law since he did not have 10 years of service nor was he sixty years old. On February 9, 1973, he filed the first of several lawsuits against the University and numerous of its employees and officials challenging his dismissal. The District Court found that the faculty committee hearing which recommended his termination was deficient in procedural due process and ordered a rehearing by the University with additional procedural safeguards. See **Bowling v. Matthews**, 511 F.2d 112 (5th Cir. 1975).

The University then initiated a lengthy and elaborate hearing procedure which culminated in a decision to terminate Dr. Bowling's employment effective August 15, 1976. Dr. Bowling's continued employment with the University during this lengthy hearing process enabled him to qualify to retire under the state teachers' retirement law. He became eligible to retire in May of 1976 by virtue of having a minimum of 10 years of creditable service and being 60 years

of age. Dr. Bowling did not, however, retire when he became eligible for retirement.

Following his dismissal in August, 1976 Dr. Bowling filed three more lawsuits and was unsuccessful in each although he continued to pursue his appeals petitioning for review all the way to this Court. See **Lawrence E. Bowling v. Charlie Scott, et al.**; and **Lawrence E. Bowling v. David Mathews, et al.**, 587 F.2d 229 (5th Cir. 1979); reh den 591 F.2d 1343, cert den 100 S.Ct. 69, 444 U.S. 835, 62 L.Ed.2d 45, reh den 100 S.Ct. 471, 444 U.S. 974, 62 L.Ed.2d 390. The complaint in this case alleges that Dr. Bowling's litigation "was finally concluded adversely to him in late 1979; and he decided to retire."

Dr. Bowling also filed a federal lawsuit against the Director of the State Department of Industrial Relations, the Appeals' Referee, the members of the Board of Appeals, the Clerk of the Board of Appeals and the attorneys for the Department of Industrial Relations relating to unemployment benefits. He filed a similar action in state court and sued the same departmental officials and the Board of Trustees of the University of Alabama. **Bowling v. Carter**, CV-78-223, Circuit Court of Tuscaloosa County. The District Court dismissed the federal action for failure to state a claim and the Fifth Circuit upheld that dismissal. See **Bowling v. James N. Carter, et. al.**, Case No. 78-3822 (5th Cir. 1980, Unpublished Opinion).

He filed still another related case in federal court against Dr. Frank Rose, the former president of the University of Alabama. **Bowling v. Rose**, CA-80-7225 (D.C.N.D. Ala.) See also **Bowling v. Pow**, 301 So.2d 55 (Ala. 1974) (defamation action ultimately decided adversely to Bowling), another related case.

When the Retirement Systems administrative officers denied his demand for retroactive benefits, he appealed that denial to the Systems' governing Board of Control, to which he made the same statutory construction and First Amendment arguments, and that Board denied his request for retroactive benefits.

Petitioner then, in November, 1981, filed this suit against the members of the Board of Control of the Teachers' Re-

tirement System and apparently every officer and employee of the Retirement System with whom he had communicated either orally or by written correspondence seeking retroactive retirement benefits and punitive damages.

In addition to asserting his argument concerning the construction of the applicable state statute and his First Amendment right to petition argument, Petitioner, for the first time, asserted the argument that he had not retired when he first became eligible because he had not been informed of the 1969 change in the retirement law. Prior to 1969 the state's retirement law provided for the payment of a reduced benefit for retirement before age 65. In 1969 the state legislature amended the law to provide for full benefits for retirement at age 60 or thereafter with at least 10 years of service. The 1969 handbook, the newsletter, and other items published and distributed by the Teachers' Retirement System in 1969 highlighted this change in benefits. Handbooks and other publications prepared in subsequent years, while correctly explaining the benefits then in effect, have not specifically noted that such benefits differ from those provided before 1969.

The Plaintiff's charges against individual defendants in this case may be summarized as follows:

Petitioner charged that Defendant Jan Orgeron, a statistician and a merit system employee, did not answer his "urgent" letter of December 19, 1979, until January 2, 1980, after the Christmas and New Year's holidays; that Defendant William T. Stephens, legal counsel for the state Teachers' Retirement System and a state assistant attorney general, refused to request an advisory opinion from the State Attorney General; that Defendant David G. Bronner answered only the third of three letters which plaintiff sent to him and that plaintiff sought Dr. Bronner's support for his position but that Dr. Bronner opposed his request for additional benefits before the Board of Control of the Teachers' Retirement System; that defendants Donald L. Yancey and William C. Walsh did not supply plaintiff with all of the information which plaintiff sought when plaintiff sought it; that Defendant Paul R. Hubbert advised Plaintiff to seek the assistance of a member of the Alabama Legislature in obtaining an advisory opinion from the State Attorney Gen-

eral "although Dr. Hubbert knew or reasonably should have known that an advisory opinion issued to a member of the legislature had no binding effect on the Teachers' Retirement System"; and that the other Defendants, members of the Board of Control of the state Teachers' Retirement System, misinterpreted the state teachers' retirement law in ruling that such law did not permit payment of retirement benefits for a period prior to the teachers' submission of a retirement application.

The District Court dismissed the claims asserted under 42 U.S.C. §§ 1985 and 1986 for failure to state claims upon which relief could be granted, and dismissed the claims under 42 U.S.C. § 1983 asserted against the Respondents in their official capacities because of the bar of the Eleventh Amendment. The District Court granted summary judgment as to claims asserted against Respondents in their individual capacities on the basis that the Respondents were entitled to qualified immunity, and that the claims simply lacked merit.

The District Court found that Respondents had not conditioned Petitioner's receipt of retirement benefits upon his relinquishment of his right to petition the courts and suggested that this argument by Petitioner was an "after-the-fact fabrication". The District Court also found that any failure to personally advise Petitioner of the 1969 change in the law when it occurred would not constitute a failure of notice sufficient to be a due process violation where Respondents had subsequently disseminated to him publications that correctly reflected the law after 1969.

On appeal the Court of Appeals affirmed the judgment of the District Court. The Court of Appeals found that both Petitioner's First Amendment claim and his equal protection claims were "factually impossible" and that his due process claims were "untenable", "spurious", "patently unreasonable" and "ridiculously burdensome". The Court of Appeals concluded that there was "no merit" to Petitioner's First Amendment and equal protection claims and, with respect to his due process claim, that "the record amply demonstrates that Bowling received all the process he was due".

Reasons for Denying the Petition

I

The decision below turns on the unique facts of this case and is without constitutional or precedential significance.

Petitioner's case, from the early administrative proceedings through the District Court, through the Court of Appeals and now to this Court, has been a kaleidoscope of changing factual allegations and shifting legal theories. Every time one looked it was different.

As noted in the Statement of the Case, the factual support for Petitioner's claims was so lacking that the district court judge suggested that Petitioner's First Amendment claim was an "after-the-fact fabrication" and the judges of the Eleventh Circuit said that both Petitioner's First Amendment and his equal protection claims were "factually impossible", and that his due process claims were "spurious", "untenable", "patently unreasonable" and "ridiculously burdensome".

II

The factual premises of the Questions Presented for Review by the petition are not the facts of this case as shown by the record.

The factual premise of the first question presented for review in the Petition is that Petitioner did not receive "clear and timely notice of a change in the retirement law entitling him to retire at age 60 with full retirement pension". The record shows that Petitioner was provided with a handbook in 1972, prior to the time that he became eligible to retire, which correctly explained the benefits payable under the law governing the Teachers' Retirement System and, in particular, that Petitioner could retire at age 60 with 10 years of service with a full retirement pension.

The exquisitely devious subtlety in Petitioner's statement of the question is presumably based upon the argument which he made in the courts below that he was not notified of the **change** although he was notified of the **changed benefits**. In other words, he argues that although they

provided me with an up-to-date explanation of the law they did not especially call to my attention that the law was different from what it had been prior to 1969. He asserts, at page 2 of the Petition, that "Although the change was explained in the *TRS Handbook*, 1969, respondents did not supply petitioner a copy of **this edition** of the handbook." (emphasis added) He conveniently does not mention that, prior to the time that he became eligible to retire, he received a copy of a later edition of the TRS handbook which correctly explained eligibility requirements and benefits.

The Court of Appeals deservedly called Petitioner's argument "untenable", "patently unreasonable" and "absurdly burdensome".

The factual premise of the second question presented for review in the Petition is that Respondents withheld Petitioner's pension because he had not relinquished his right to petition the courts for reinstatement. The District Court found no evidence that Respondents' had conditioned the payment of retirement benefits to Petitioner upon his relinquishment of his right to petition the courts but, rather, suggested that this argument by Petitioner was an after-the-fact fabrication. The Court of Appeals found petitioner's assertion to be "factually impossible". The court noted that Respondents did not even know of Petitioner's lawsuits when he became eligible to retire. The record shows that Respondents, most of whom were not even affiliated as officers or employees of the Retirement Systems until years after Petitioner's lawsuits were filed, and after he became eligible to retire, did not know of Petitioner's lawsuits until after he applied for retirement in 1980.

III

The decision below is consonant with prior decisional law. The cases cited by Petitioner are not applicable in this case and Petitioner has not cited any decision of this Court or of the Courts of Appeals, and none is known to Respondents, with which the decision below would conflict.

The Court of Appeals raised, but pretermitted, the question of whether Petitioner had a constitutionally protected fundamental right to retire under a state-created retirement

plan as soon as he became eligible to do so citing **Karr v. Schmidt**, 460 F.2d 609 (5th Cir.), cert. denied 409 U.S. 989 (1972). Regardless of that issue, both the Court of Appeals and the District Court found that, under the circumstances of this case, Petitioner did not have a right to the individual notice of each change in the state's statutory law to which Petitioner claims to be entitled. This is consistent with the decisions of other Courts of Appeals in **Ornstein v. Regan**, 604 F.2d 212 (2nd Cir. 1979) and **Grueschow v. Harris**, 633 F.2d 1264 (8th Cir. 1980).

The cases cited by Petitioner, **Mullane v. Central Hanover Trust Co.**, 339 U.S. 306, 70 S.Ct. 652 (1950) and **Mennonite Board of Missions v. Adams**, 462 U.S. 803, 103 S.Ct. 2706 (1983), involving vastly different factual situations, one involving a judicial settlement proceeding and the other involving a tax sale, simply stand for the general proposition that a person cannot be deprived of property without due process of law and, under the facts of those cases, a certain type notice and hearing were required to provide due process. Due process is always fact-specific, i.e., the process due is dependent upon the facts of the situation. Even if individual notice of the 1969 statutory change to each person eligible for benefits under the changed law were required by these cases, Petitioner was not eligible for benefits under the changed law in 1969 and did not become eligible until 7 years later by which time he had received personal notice of the changed benefit law. Petitioner was given notice and was given a hearing and the Court of Appeals found that the record amply demonstrates that Petitioner "received all the process he was due".

With respect to the second question presented by this Petition, not only is Petitioner's First Amendment claim factually unsupportable, it is legally invalid and misdirected at these Respondents. His assertion that his filing of an application for retirement benefits would have mooted his federal lawsuit, thus denying him the right to petition the courts, is really an attack upon the federal courts' mootness doctrine. The real thrust of his theory is not that these Defendants conditioned his receipt of retirement benefits upon his foregoing his right to petition the courts but, rather, that the **federal courts** conditioned his right to petition

the courts upon his foregoing his receipt of retirement benefits.

The District Court found that Petitioner's filing of an application for retirement benefits would not have mooted his federal lawsuits challenging his termination on federal constitutional grounds and Petitioner has not presented any applicable judicial precedent to sustain that position. To the contrary, Petitioner's litigation continued after he filed his retirement application and after he began drawing retirement benefits.

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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